

STATE OF MICHIGAN  
IN THE SUPREME COURT

HARMONY MONTESSORI CENTER,

Supreme Court No. 154819

Petitioner-Appellant,

Court of Appeals No. 326870

v

CITY OF OAK PARK,

Michigan Tax Tribunal  
Case No. 0370214

Respondent-Appellee.

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**RESPONSE TO PETITIONER-APPELLANT'S  
APPLICATION FOR LEAVE TO APPEAL  
ON BEHALF OF RESPONDENT-APPELLEE, CITY OF OAK PARK**

**PROOF OF SERVICE**

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## **JURISDICTIONAL STATEMENT**

This is the second appeal initiated by Petitioner-Appellant, Harmony Montessori Center, seeking a reversal of the decision of the Michigan Tax Tribunal (Tribunal) denying Harmony's request for tax exemption under both MCL 211.7n and 211.7o. On remand from the Court of Appeals, the Tribunal issued a Final Opinion and Judgment on Remand on March 20, 2015. Exhibit A, Final Opinion and Judgment on Remand. In an opinion and order entered on October 13, 2016, the Court of Appeals affirmed the Tribunal's decision denying Harmony's contention that it was entitled to the desired tax exemptions. Exhibit B, October 2016 Court of Appeals Opinion. This Court has jurisdiction over this appeal pursuant to MCL 205.753(2) and MCR 7.303(B)(1).

## STATEMENT OF QUESTIONS PRESENTED

- I. Whether the Michigan Tax Tribunal and the Court of Appeals misapplied the law or adopted a wrong principle when it held that Harmony's programs do not qualify for exemption under MCL 211.7n because it found that Harmony's programs do not contribute substantially to the relief of the educational burden of government?**

Petitioner-appellant says: "Yes."

Respondent-appellee says: "No."

The Michigan Tax Tribunal said: "No."

The Court of Appeals said: "No."

- II. Whether the Michigan Tax Tribunal and the Court of Appeals misapplied the law or adopted a wrong principle when it held that Harmony's programs do not qualify for exemption under MCL 211.7o because Harmony was neither chiefly organized for charity nor as a charitable institution overall?**

Petitioner-appellant says: "Yes."

Respondent-appellee says: "No."

The Michigan Tax Tribunal said: "No."

The Court of Appeals said: "No."

## **COUNTER STATEMENT OF NEED FOR INTERLOCUTORY REVIEW**

Petitioner Harmony Montessori Center seeks reversal of the Court of Appeals opinion which affirmed the Michigan Tax Tribunal's decision which, for a second time, determined that Harmony had failed to sustain its burden of proving that it was entitled to an exemption from ad valorem property taxes as either an educational institution or a charitable institution. In contrast to the position advanced by Harmony to this Court, the Court of Appeals, mindful of its obligation not to substitute its decision for that of the Tribunal, properly reviewed the Tribunal's considered factual findings and application of legal principles. Contrary to Harmony's prediction that the Court of Appeals decision will cause irreparable harm to Michigan law, both the Tribunal's and the Court of Appeals' decisions are fully supported by existing case authority which has been properly applied to the evidentiary record established in this case. Review by this Court is simply unwarranted and Harmony's application should be denied

## COUNTER STATEMENT OF FACTS

In the Michigan Tax Tribunal, Harmony and the City stipulated to the following facts:<sup>1</sup>

1. Petitioner in the above captioned matter, Harmony Montessori Center, operates early education programs including preschool and Kindergarten programs at its site (see Stipulation 4) in Oak Park Michigan.

2. Respondent in the above captioned matter is the City of Oak Park, Michigan.

3. The subject property is located within the geographic confines, and under the taxing jurisdiction, of Respondent.

4. The property at the center of this controversy (the “subject property”) is located at 26341 Coolidge Highway, Oak Park, Michigan 48237, and is identified as parcel number 52-25-19-277-035.

5. The tax years in issue in this case are 2009, 2010, 2011, and 2012.

6. Petitioner owned the subject property as of the relevant tax day for each of the years in issue.

7. As of the relevant tax days for each of the years in issue, Petitioner’s occupancy of the subject property was solely for the purposes for which it was incorporated.

8. For each of the years in issue, Petitioner was a nonprofit entity.

9. Petitioner was organized as a nonprofit corporation under Michigan law.

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<sup>1</sup>The Joint Stipulation of Facts is attached as Exhibit C.



10. The Internal Revenue Service has accorded Petitioner status as an IRC §(c)(3)entity; Petitioner has such status as of tax day for each of the years in issue.

11. In providing educational services to preschool and kindergarten students, Petitioner, for the tax years in issue, did not discriminate among recipients of its services.

12. For each of the years in issue, Petitioner charged fees for participation in its programs; these fees did not exceed the amount Petitioner required to provide its services.

13. For each of the years in issue, Petitioner reduced or eliminated tuition charges for students whose parents were unable to pay the full amount.

14. Petitioner holds a License for the Care of Children that was issued by the State of Michigan. The License was renewed effective April 15, 2012 and expires on April 14, 2014. The License names the subject property as the licensed facility.

15. The Montessori early education teaching method consists of multiage groupings that foster peer learning, uninterrupted blocks of work time, and guided choice of work activity. In addition, a full complement of specially designed Montessori learning materials is meticulously arranged and available for use in an aesthetically pleasing environment.

The teacher, child, and environment create a learning triangle. The classroom is prepared by the teacher to encourage independence, freedom within limits, and a sense of order. The child, through individual choice, makes use of what the environment offers to develop himself, interacting with the teacher when support and/or guidance is needed.

Multiage groupings are a hallmark of the Montessori Method: younger children learn from older children; older children reinforce their learning by teaching concepts

they have already mastered. This arrangement also mirrors the real world, where individuals work and socialize with people of all ages and dispositions.

In early childhood, Montessori students learn through sensory-motor activities, working with materials that develop their cognitive powers through direct experience: seeing, hearing, tasting, smelling, touching, and movement.

American Montessori Society, *Introduction to Montessori*<<http://www.amshq.org/Montessori%20Education/Introduction%20to%20Montessori.aspx>> (accessed August 9, 2012).

16. Petitioner's teacher-employees hold Montessori teaching credentials from the American Montessori Society. The credentials include:

<u>Name</u>	<u>Montessori Credential</u>	<u>Date Awarded</u>
Merly S. Cronk	Associate Early Childhood Credential	May 1999
Karen E. King	Preprimary Credential	June 1978
Susan J. Murrell	Provisional Preprimary Credential	June 1990

17. There are only two institutions in Michigan that award Montessori early childhood credentials, Adrian Dominican Montessori Education Institute in Adrian, Michigan and Michigan Montessori Teacher Education Center in Rochester Hills, Michigan. To be awarded an early childhood credential from Adrian Dominican Montessori Education Institute, a trainee must pass a ten month course of study.

18. Petitioner is an affiliate of the Michigan Montessori Society and provides instruction to its students in conformance with the Montessori teaching method.

19. Petitioner is not accredited by the state of Michigan under Revised School Code, MCL 380.1 *et seq.*

20. Petitioner's teacher-employees are not certificated by the state of Michigan under the Revised School Code, MCL 380.1 *et seq.*

21. Petitioner's current Admissions Policy states:

Enrollment is open to children from the age of 18 months through kindergarten.

Harmony Montessori Center does not discriminate on the basis of race, sex, color, religion, or national and ethnic origin in administration of its educational policies, admissions policies, and other school-administered programs.

Harmony Montessori Center reserves the right to dismiss a student when, in the opinion of the administration, his/her interests or those of Harmony Montessori Center will best be served by such action.

If a child leaves the program before the end of the school year, a 30 day notice must be given. At that time, the initial deposit may be used as the final payment.

The source of Petitioner's current Admissions Policy is Harmony Montessori Center, *Parent Handbook*, at 3-4.

22. During the years in issue, Petitioner offered a Wobbler Program, Toddler Programs, Preschool Programs, and Kindergarten Programs. The Wobbler Program was divided into half-day and full-day programs; both the half-day and full-day programs were offered between two and five days per week. The Toddler Programs were divided into half-day and full-day programs; both the half-day and full-day programs were offered five days per week. The Preschool Programs were divided into half-day and full-day programs; both the half-day and full-day programs were offered five days per week. The Kindergarten Programs were divided into half-day and full-day programs; both the half-day and full-day programs were offered five days per week.

23. The number and age range of students participating in each program of the programs identified in Stipulation 23 are delineated in Table A, below, Petitioner has included and continues to include students who participate in the Preschool Program in some activities of the Kindergarten Program. Petitioner's teachers and the Preschool Program students' parents assess the students' development to determine the extent to which the students participate in the Kindergarten Program. The Number of students who participate in both the Preschool Program and Kindergarten Program are depicted in Table A as "(+)" in the Kindergarten Program rows in Table A.

**Table A**

<b>Applicable school Year</b>	<b>Program</b>	<b>Number of Students</b>	<b>Age Range</b>
2008-2009	Toddler	16	18months-3years
	Preschool	22	2½years-6years
	Kindergarten	2(+3)	2½years-6years
2009-2010	Toddler	16	18months-3years
	Preschool	22	2½years-6years
	Kindergarten	2(+2)	2½years-6years
2010-2011	Wobbler	4	12months-17months
	Toddler	12	18months-3years
	Preschool	20	2½years-6years
	Kindergarten	4(+2)	2½years-6years
2011-2012	Toddler	14	18months-3years
	Preschool	20	2½years-6years
	Kindergarten	4(+4)	2½years-6years

24. Petitioner's Kindergarten curriculum includes five focus areas designed to teach students numerous skills, including:

### **LANGUAGE**

- Phonetic sound recognition
- Phonogram recognition
- Pronunciation of long vowels
- Ability to read phonetic words
- Sight word recognition
- Ability to read including sentences and short books
- Ability to use language creatively
- Development of competent verbal communication skills

### **MATH**

- Ability to count to 100
- Ability to count numbers above 100
- Understanding of the decimal system
- Understanding of exchanging
- Addition
- Addition with decimal system
- Subtraction

- Multiplication
- Money
- Telling Time

### **HANDWRITING**

- Proper pencil grip
- Forming letters and numbers correctly
- Writing on lined paper

### **GEOGRAPHY and SCIENCE**

- Ability to read maps
- Identification of the continents
- Botany(*e.g.*, field trips to farms, nature centers, and apple orchards)
- Zoology; (*i.e.*, ability to perceive and understand different animals)

### **WORK HABITS**

- Ability to work well in a group
- Strategies to use time efficiently
- Inspiring thirst for new challenges
- Development of maturity necessary to contribute to group
- Development of self-control

25. Harmony's Preschool curriculum includes five focus areas designed to impart numerous underlying skills. They include:

### **PRACTICAL LIFE**

- Ability to dress self
- learning to pour without spilling
- Performing work in proper area (*e.g.*, rug, table)
- Handling work carefully
- Putting work away neatly
- Practicing good health rule(*e.g.*, washes hands after use of lavatory)
- Comprehending and completing multi-step exercises

### **SENSORIAL**

- Distinguishing shapes
- Recognizing and naming shapes

- Recognizing and naming colors
- Distinguishing size and dimension
- Distinguishing an object by touch
- differentiating sounds

## **LANGUAGE**

### **A. Oral**

- Clear sound pronunciation
- Growing vocabulary
- Speech in sentence form
- Ability to relate and organize ideas in sequences
- Confidence to speak in front of a group

### **B. READING DEVELOPMENT**

- Learning phonetic sounds
- Understanding beginning sounds
- Ability to blend sound to form words
- Reading three-letter words
- Working with phonograms (e.g., 'sh,' 'ch', and 'th')
- Learning long vowel sounds
- Reading sentences and short books

### **C. WRITING**

- Proper pencil grip
- Trace letters and numbers
- Using metal insets properly (*i.e.*, the ability to trace around shapes carefully)
- Able to cut with scissors
- Able to write his/her name
- Writing on lined paper

## **MATH**

- Recognizing quantity/symbols of 1-5
- Putting numbers 1-10 in order
- Recognizing and putting numbers 11-20 in order
- Counting to 100
- Awareness of decimal system
- Adding one digit numbers
- Adding two and three digit numbers
- Introduce subtraction

## SOCIAL DEVELOPMENT

### A. **BEHAVIOR**

- Showing self confidence
- Carrying out responsibilities
- Working well with others
- Following ground rules
- Has self-control
- Has a good relationship with teacher

### B. **GROUP SETTING**

- Listening attentively (*e.g.*, stories, poems)
- Responding appropriately
- Participating in group activities
- Has self-control (*e.g.*, ability to wait his/her turn)

### C. **WORK HABITS**

- Following directions
- Working independently
- Completing cycle of activity
- Able to sit and concentrate on work
- Able to choose own activities

26. Petitioner charges tuition for participation in its programs, as delineated in

Table B [see Exhibit C for Table].



27. During each of the years in issue, Petitioner provided instruction to between two and four Kindergarten students, as shown in Table C below:

<b>Table C</b>		
<b>Applicable School Year</b>	<b>Full-Day Kindergarten</b>	<b>Half-Day Kindergarten</b>
2008-2009	2	0
2009-2010	2	0
2010-2011	1	3
2011-2012	2	2

28. Table D below lists the ages of Kindergarten participants as of December 1 of each school year.

<b>Applicable School Year</b>	<b>Age 4</b>	<b>Age 5</b>	<b>Age 6</b>
2008-2009	0	1	1
2009-2010	2	0	0
2010-2011	0	4	0
2011-2012	0	4	0

29. As represented on their respective websites, other Montessori schools in Michigan charge varying amounts of tuition, as shown in Table E below:

Table E			
School	Type of Program	Fee Charged	Applicable School Year (if available)
Children's Place Montessori 32175 Folsom Rd. Farmington Hills, MI 48336	Full Day (open enrollment for children aged 3-6)	\$8550 annually	2011-2012
	Extended Half-Day (6-5 hours, open enrollment for children aged 3-6)	\$7362.50 annually	
	Half-Day (2.5 hours, open enrollment for children aged 3-6)	\$1777.50 annually	
First Friends Montessori 11100 W. St. Clair Romeo, MI 48065	Half-Day Kindergarten	\$4,000 annually	2012-2013
	All Day Kindergarten	\$5,500 annually	
Montessori Center of Downriver 15575 Northline Rd. Southgate, MI 48195	Full day preschool or Kindergarten with Daycare	\$764 monthly or \$7,420 annually	Currently Advertised
	Full day preschool or Kindergarten without Daycare	\$660 monthly or \$6,306 annually	
	Half-day preschool or Kindergarten (9:00 - 11:30)	\$350 monthly or \$3,339 annually	
	Half-day preschool or Kindergarten (1:00-3:30)	\$325 monthly or \$3,150 annually	
	Toddler	7.5 hours per day: \$727 monthly or \$7,059.15 annually	
		8 hours per day: \$776 monthly or \$7,529.76 annually	
		9 hours per day: \$873 monthly or \$8,473 annually	

The sources for data shown in Table E are: Children's Place Montessori, Tuition<<http://www.childrensplacemontessori.com/photo2.htm>>(accessed August 7, 2012); First Friends Montessori, Admissions<<http://www.firstfriendsmontessori.org/>>(accessed August 7, 2012); and Montessori Center of Downriver, Programs and Tuition <<http://www.montessoridownriver.com/programs.htm>> (accessed August 9, 2012).

30. Non-Montessori schools in Michigan charge varying amounts of tuition, as shown in Table F below:

<b>Table F</b>			
<b>School</b>	<b>Type of Program</b>	<b>Fee Charged</b>	<b>Applicable School Year (if available)</b>
Friends School in Detroit 1100 St. Aubin Detroit, MI 48207	Preschool	\$7,700 annually	2011-2012
	Kindergarten	\$9,9750 annually	
Happy Dino 375 Hamilton Row Birmingham, MI 48009	Preschool	\$35 daily, \$150 weekly, or \$450 monthly	Currently Advertised
Sunflowers Christian Preschool 529 Hendrie Blvd. Royal Oak, MI 48067	Four-year old Preschool (33-weeks; three days per week; two hours, 45 minutes	\$1,515 annually (non-church members) or \$1,023 annually (church members)	2011-2012
	Three-year old Preschool (33-weeks; two days per week; two hours, thirty minutes per day)	\$1,023 annually (non-church members) or \$920.70 annually (church members)	

The sources for data shown in Table F are: First Presbyterian Church of Royal Oak: Sunflowers Christian Preschool, *Registration Form* <<http://www.fpero.org/media/Sunflowers/Sunflowers%20Registration%20application%20form%20master.pdf>> (accessed August 6, 2012); Friends School in Detroit, *Tuition Schedule 2011-2012* <<http://www.friendsschool.org/Portals/0/forms/Tuition%20and%20Financial%20Aid%20Information%202011.2012%281%29.pdf>> (accessed August 9, 2012); and Happy Dino, Preschool <[http://happydinoplaycare.com/?page\\_id=11](http://happydinoplaycare.com/?page_id=11)> (accessed August 6, 2013).

31. Although this case as originally filed with the Tax Tribunal included a valuation claim, that claim has been withdrawn and is no longer before this Tribunal.

### ***Procedural History***

Harmony filed this action in the Michigan Tax Tribunal on May 29, 2009. At the request of the parties, the Tribunal ordered the parties to submit a joint statement of stipulated facts and cross-motions for summary disposition. A joint statement of stipulated facts was filed on August 13, 2012 and the parties filed competing motions for summary disposition. On September 26, 2012, the Tribunal issued its decision denying Harmony's motion for summary judgment and granting the City's motion. Exhibit D, Tax Tribunal Opinion and Judgment.

The Tax Tribunal concluded that Harmony did not sustain its burden of proving that it was entitled to the educational institution exemption under MCL 211.7n because Harmony failed to establish that its preschool program fit within the general scheme of education and relieved the educational burden of government. The Tribunal cited *Association of Little Friends, Inc v City of Escanaba*, 138 Mich App 302 (1985) as providing guidance on the issue and, while the Tribunal noted that the State has appropriated funding towards the Great Start Readiness Program, the Tribunal concluded that, based on the stipulated record in this case, Harmony had not sustained its burden with respect to its preschool program:

The Great Start Readiness Program is very specific and contains several requirements to be eligible for funding under MCL 388.1632d(4), including nutritional services, health and development screening, referrals to social service agencies, and a school readiness advisory committee. **There is nothing in the admitted exhibits and documentary evidence, affidavits, or Motions that would indicate that the Montessori program at issue includes, or is targeted in any way, to educationally disadvantaged children, or offers the services required under the Program.** The fact that such a program exists does not establish that preschool is state mandated or otherwise negate the Court of Appeals holding in *Association*

*of Little Friends*. The Tribunal finds that providing preschool *does not* fit into the scheme of education provided by the state and supported by public taxation. It therefore follows that Petitioner does not relieve any governmental, educational burden.

Exhibit D, pages 17-18 of 26 (emphasis added).

With respect to Harmony's kindergarten program, the Tribunal noted that kindergarten was **not** mandated by the State of Michigan during the tax years at issue and concluded that, as such, Harmony's kindergarten program did not sufficiently relieve the governmental burden of education. The Tribunal acknowledged that the State does expend funds to those school districts which offer kindergarten but concluded that Harmony had not sustained its burden of establishing that its program substantially relieved the governmental burden:

. . . The Tribunal does not find that 23 students out of a total of 158 represents [over a four year period] a substantial portion of the students enrolled in the overall programs offered by Petitioner. The total number of enrollees in petitioner's kindergarten program, per year, was five during 2008-2009, four during 2009-2010, six during 2010-2011, and eight during 2011-2012. (Joint Stipulation #23). Further, Petitioner has failed to establish that these students would enroll in publicly funded kindergarten programs, or even that there was a kindergarten program in their school district that they could enroll in, if Petitioner's program were not in existence.

Exhibit D, page 20 of 26.

Turning to Harmony's claim of entitlement to the charitable institution exemption under MCL 211.7o, the Tribunal concluded that the stipulated record was insufficient to establish that Harmony was organized chiefly, if not solely, for charity:

. . . Petitioner does not provide its programs as "gift . . . for the benefit of an indefinite number of persons" but rather charges tuition for the services provided. (Joint Stipulation of Facts #26). The parties have stipulated that Petitioner "reduced or eliminated charges for students whose parents were

unable to pay the full amount.” (Joint Stipulation of Facts, Petitioner’s Exhibit A). Providing free or reduced tuition to an undisclosed number of existing students does not support a finding that Petitioner is chiefly or solely organized for charity. Further, in the affidavit of Anna Fast, Co-Director of Harmony Montessori, she states:

We have no written policy to deal with instances where a parent cannot pay tuition. Harmony’s Co-Directors, Ms. King and I, consider the circumstances case-by-case and make a decision about reduced or waived fees. We consider factors like if the parent has been laid off from his job, what the consequences to the student’s development will be **if the student cannot continue**, and how much tuition is needed so that Harmony can keep its doors open. Petitioner’s Exhibit A. (Emphasis added).

. . . The great weight of the evidence reflects that Petitioner was providing educational services in-line with the Montessori method, getting paid a market rate for its services, and not acting as a charitable institution for the tax years at issue.

Exhibit D, pages 23-24 of 26.

### **Harmony’s First Appeal**

Harmony appealed the Tax Tribunal’s decision to the Court of Appeals (Docket No. 312856). On appeal, Harmony argued that, based on the stipulated facts, it, not the City, was entitled to judgment as a matter of law. On February 18, 2014, in an unpublished decision, the Court of Appeals reversed the decision of the Tax Tribunal, concluding that genuine issues of material fact exist with respect to Harmony’s status as both an educational and a charitable institution. Exhibit E, Court of Appeals Opinion.

With respect to the educational exemption, the Court of Appeals concluded that both preschool and kindergarten programs fit within the general scheme of education provided by the State and supported by public taxation. Citing MCR 7.215(J)(1), the

Court of Appeals declined to follow the authority of *Ass'n of Little Friends, Inc v Escanaba*, 138 Mich App 302 (1984) which held that preschool and vocational programs did not fall within the general scheme of education. Exhibit E, page 2, fn 1. The Court of Appeals concluded that kindergarten programs fit within the general scheme of education because, even though kindergarten was not mandatory, the state provided funding for kindergarten programs on a per pupil basis. Exhibit E, page 2 .

The Court of Appeals also concluded that preschool programs are within the general scheme of education:

Superficially, state-funded preschool programs are limited to a program for educationally disadvantaged children. See MCL 388.1632d and MCL 388.1632d(1), outlining the Great Start Readiness Program but limiting it to children who are “educationally disadvantaged,” and within a narrow age range. However, an increasing emphasis is being placed on prekindergarten education. For a limited purpose, the Legislature broadened the definition of an elementary pupil to include children enrolled in a preschool program. MCL 388.1604(2). MCL 388.1021 et seq. provides licensing requirements for parent cooperative preschools. The Board of Education is now issuing standards for prekindergarten childhood education, including curriculum guidelines for, and appointing committees to study, preschool programs. Even if the standards are not mandatory, they demonstrate that the government has adopted preschool education into its general scheme of education. Finally, even though the Great Start Readiness Program is limited to children who are “educationally disadvantaged,” the program and funding indicate that the Legislature and the Board of Education generally recognize the importance of prekindergarten education. MCL 388.1632d(1). Therefore, preschool programs also fit into the government's general scheme of education.

Exhibit E, page 3.

The Court then concluded that there existed a genuine issue of material fact as to whether Harmony’s programs substantially contributed to the relief of the burden of government:

However, there is a substantial question of fact about whether “a substantial portion of the student body” could and would attend a state-funded elementary school or preschool. *David Walcott Kendall Mem. Sch.*, 11 Mich App at 240. The tax tribunal determined that petitioner did not make a substantial contribution based solely on the number of children enrolled in petitioner's kindergarten or joint kindergarten and preschool programs. It failed to consider the children who were enrolled in petitioner's preschool program that would and could have attended the Great Start Readiness Program, and that would and could have attended a state-funded kindergarten program, even though they were enrolled in a Montessori preschool program. MCL 380.1147(1) and (2) allow a child who is five years old on December 1 of the enrollment year, to enroll in elementary school. MCL 388.1632d generally outlines the requirements for children to qualify for the Great Start Readiness Program. Children who are aged four qualify for the program. MCL 388.1632d(1). **The lower court record does not contain information regarding the ages of the preschool children or whether they could and would attend kindergarten or a Great Start Readiness Program preschool.**

Exhibit E, pages 3-4.

Turning to the charitable exemption under MCL 211.7o, the Court of Appeals concluded that a genuine issue of material fact existed as to whether Harmony was a “charitable institution”:

Consequently, the fact that petitioner charges for its services does not necessarily preclude it being a “charitable institution.” Conversely, the fact that an institution may be operating at a loss at any given point in time does not automatically make it charitable; if the deficit is to be made up by those receiving the services, it would not be charitable, whereas if the deficit is not being made up by those receiving the services, it might be. *Wexford*, 474 Mich. at 207–209, 217. It appears from the record so far developed that any member of the public may obtain from petitioner more education than they are, strictly speaking, paying for. We conclude, therefore, that petitioner has established a genuine question of material fact whether it is a charitable institution.

Exhibit E, page 5.



**Remand to the Tax Tribunal**

The case was remanded to the Tribunal and an evidentiary hearing was conducted on January 28, 2015. Exhibit F, Transcript of January 28, 2015 evidentiary hearing. Harmony offered testimony from two witnesses: Anna Fast, a co-director, administrator and teacher for Harmony; and Karen King, Harmony's program director and a preschool/kindergarten teacher.

On March 20, 2015, the Tribunal issued its Final Opinion and Judgment on Remand, concluding that Harmony had, once again, failed to sustain its burden of establishing that it was entitled to either exemption. Exhibit A. As it was directed to by the Court of Appeals, the Tribunal first analyzed whether Harmony had established that it contributed substantially to the relief of the educational burden of government by evaluating whether, if Harmony were not in existence, a substantial portion of Harmony's students could and would instead attend a State-supported school. Exhibit A, pages 2-7 of 10. The Tribunal concluded that Harmony had sustained its burden of establishing that its five-year-old students *could* attend state-funded kindergarten.

However, the Tribunal went on to conclude that Harmony could not sustain its burden of establishing that a substantial portion of Harmony's students *would* attend a state-funded kindergarten. The Tribunal noted that, based upon the testimony of Karen King and JSOF 23, not all of the five-year-old children enrolled at Harmony attended Harmony's kindergarten program and that the parents of these children chose, instead, to have them participate in the preschool program for an additional year. Exhibit A, pages 3-4 of 10. Over the course of the four school years at issue, only 23 children participated

in the kindergarten program.<sup>2</sup> Of these 23 children, 11 of them *could not* have attended a state-supported kindergarten because they were under five-years-old. This leaves a total of 12 five-year-old children (children who *could* attend a State-funded kindergarten) who participated in Harmony's kindergarten program over the course of four years. The following table summarizes the evidence presented by Ms. King and JSOF 23:

School Year	Number of students Attending Harmony <sup>3</sup>	Number of 5 year olds (% of total students) <sup>4</sup>	Number of students participating in kindergarten <sup>5</sup>	Number of “kindergartners” less than 5 years old <sup>6</sup>	% of total students who were 5 years old and attending kindergarten
2008-2009	40	10 (25%)	5	3	5%
2009-2010	46	12 (26%)	4	2	4%
2010-2011	44	13 (30%)	6	2	9%
2011-2012	45	12 (27%)	8	4	9%
Total over four years	175	46 (26%)	23	11	7%

<sup>2</sup>In any given year, between 1/3 to 2/3 of Harmony's five-year-old students did not participate in the kindergarten program. Exhibit A, pages 3-4 of 10.

<sup>3</sup>Exhibit F, Transcript, pages 55-56.

<sup>4</sup>Exhibit F, Transcript, pages 55-56.

<sup>5</sup>JSOF 23.

<sup>6</sup>JSOF 23.

Based upon this evidence, over the course of the four years, only 7% (12 out of 175) of Harmony's students who were eligible to participate in a state-funded kindergarten actually did participate in Harmony's kindergarten program.

The Tribunal went on to note the differences between a Montessori education and a public school education and concluded that, if Harmony were not in existence, parents would chose to send their children to another Montessori school, rather than a public school:

The Tribunal finds, given that the Montessori Method is a specific type of teaching, with specially trained teachers, multi-age interaction, advanced subject matter beyond public school kindergarten, and with small student-teacher ratios, that if Harmony didn't exist, the parents of Harmony students **would** send them to another Montessori school, but not to public school.

Exhibit A, page 5 of 10.<sup>7</sup>

The Tribunal next considered whether, assuming parents of Harmony students would send their children to another Montessori school, there were publicly-funded Montessori schools for which Harmony is relieving a burden. Based upon the evidence presented at the evidentiary hearing, the Tribunal concluded that Harmony did not relieve any governmental burden because there were no State-funded Montessori preschools and kindergartens. Exhibit A, pages 5-6 of 10.

Turning to the issue of state-supported preschool programs, the Tribunal addressed the question of whether a substantial number of Harmony students would qualify and participate in the Great Start Readiness Program (GSRP). The Tribunal concluded that

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<sup>7</sup>Harmony did not offer any documentary or testamentary evidence from current or former parents of Harmony students which established that they would have sent their five-year-old to a public kindergarten had Harmony not been in existence.

they would not. The Tribunal based its opinion on (1) the testimony from Ms. King that most Harmony students would not qualify for GSRP; (2) the testimony of Ms. Fast that only two students received need-based scholarships during the tax years in question; and (3) the testimony of Ms. Fast that Harmony has never allowed a child to attend tuition-free. The Tribunal concluded that even those families who had qualifying incomes for GSRP *would* attend another Montessori rather than the GSRP. Exhibit A, pages 6-7 of 10. Accordingly, the Tribunal concluded that Harmony had not sustained its burden of establishing that it was entitled to an educational exemption.

Turning to Harmony's claim that it was entitled to a charitable exemption under MCL 211.7o, the Tribunal noted its charge on remand from the Court of Appeals was to determine whether Harmony was organized chiefly, if not solely, for charity. Specifically, the Court of Appeals remanded the matter to the Tribunal to determine whether Harmony's operating loss in any given year is made up by those receiving its services. Exhibit A, pages 7-8 of 10. Based upon Ms. King's testimony that Harmony's deficit was made up, at least in part, the following years by increasing tuition, the Tribunal concluded that Harmony was not organized chiefly for charity and, therefore, Harmony was not entitled to an exemption pursuant to MCL 211.7o. Exhibit A, pages 8-9 of 10.

The Tribunal went on to note that the evidence did not support the overall charitable nature of Harmony:

Harmony charges a registration fee, late pick-up fees of \$1.00 per minute, schedule change fees, late tuition and return check fees. Finally, Harmony not only *never* offers free tuition to needy students, it has also given only two need-based scholarships since 2009. Further, Ms. Fast testified that

since its inception in 1998, Harmony has given only eight need-based scholarships in seventeen years and Harmony had five-hundred students attend since 1998. Harmony has no written policy regarding how it determines to offer a need-based scholarship. When questioned about the policy, Ms. Fast testified, “We don't have a formal policy.” When questioned, “Q: There is nothing in writing whatsoever about need-based discounts for disadvantaged children, is there, ma'am” “A: No.” [Tr at 36] Ms. Fast testified, “We occasionally given people discounts.” [Tr at 34] The Court determined that Harmony “does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services.” [Wexford, prong three] However, with no written policy, the Tribunal questions whether it does? Again, eight children out of 500 received discounted tuition in the seventeen years of Harmony's existence. The Tribunal finds that it is hardly a charitable institution existing “chiefly, if not solely, for charity.”

Exhibit A, pages 9-10 of 10.

### **Harmony's Second Appeal**

Harmony again appealed the Tax Tribunal's decision to the Court of Appeals (Docket No. 326870). In a 2-1 decision, the Court of Appeals concluded that Harmony had not sustained its burden of proving that it was entitled to either exemption. Exhibit B. With respect to the educational exemption, all three judges concluded that the Tax Tribunal did not misapply the law or adopt a wrong principle of law and that the Tribunal's factual findings were supported by substantial evidence. The Court agreed that “only a small percentage of its students could possibly have attended a state-funded preschool or kindergarten.” Exhibit B, page 4. Further, the Court held that there was substantial competent evidence to support the Tribunal's conclusion that the limited number of students who could attend a state-supported school would, instead, attend a different Montessori school. In arriving at its decision, the Court of Appeals specifically rejected Harmony's argument that the Tax Tribunal committed an error of law or adopted

a wrong principal of law by focusing on the Montessori technique, rather than coursework provided by Harmony, when comparing what is available in the state supported system:

Thus, and as Harmony recognizes, these [*David Walcott*] factors must be tailored to account for the circumstances placed before the tribunal in this matter. One factor is the “comparative quality and quantity of the course offered by the school . . . . Harmony does not offer “courses,” it offers different programs. In this matter, the methodology utilized by Harmony in conducting these programs is relevant to the question of the quality of the programs. Thus, we discern no error from the tribunal’s emphasis on Harmony’s teaching methods and techniques as compared to those utilized in state-funded schools.

Exhibit B, page 5 (footnotes omitted).

The Court also rejected Harmony’s argument that it reduced the state’s educational burden indirectly by preparing students for success in the future, thereby reducing the state’s burden to provide remedial educational services to its students. In addition to noting that such a theory was not likely supported by substantial and competent evidence (Exhibit B, page 5, n 24), the Court observed that the relevant legal analysis required consideration of the present burden relieved and concluded that the Tribunal did not commit legal error by failing to credit the argument. Exhibit B, page 5. In addition, the Court rejected Harmony’s reliance upon the testimony of Ms. King as establishing that 75% of Harmony’s students go on to attend public schools, finding that such a conclusion was admittedly speculative and unsubstantiated by any competent evidence. Exhibit B, pages 5-6. Finally, the Court considered and rejected Harmony’s additional arguments as lacking in merit.

With respect to the charitable exemption, the majority concluded that, based upon the evidence that Harmony made up any one year's operating deficits by increasing tuition in subsequent years, the Tribunal did not legally err in concluding that Harmony did not sustain its burden of establishing that it was a charitable institution. Judge O'Connell dissented, concluding that Harmony was entitled to the charitable exemption because it offered reduced rates of tuition to children in financial need and because its costs are not fully subsidized by tuition. In response to the dissent, the majority pointed out that Harmony was distinguishable from the petitioner in *Wexford* because Harmony never offered free tuition to a single student, had no established program for offering need-based discounts, and, since 1998, offered tuition discounts to only 8 students out of the 500 students who attended Harmony. The majority also emphasized the fact that Harmony's financial losses were absorbed, not by Harmony or fundraising or donations, but by students' families through increased tuition. Exhibit B, pages 8-9.

## STANDARD OF REVIEW

Petitioner-Appellant, Harmony Montessori, seeks appellate review of the Michigan Tax Tribunal's and the Court of Appeals' decisions denying its petition for tax exemptions. In *Briggs Tax Service, LLC v Detroit Public Schools*, 485 Mich 69, 75 (2010), this Court outlined the standard of review applicable to appeals of Tax Tribunal decisions:

The standard of review of Tax Tribunal cases is multifaceted. If fraud is not claimed, this Court reviews the Tax Tribunal's decision for misapplication of the law or adoption of a wrong principle. We deem the Tax Tribunal's factual findings conclusive if they are supported by "competent, material, and substantial evidence on the whole record." But when statutory interpretation is involved, this Court reviews the Tax Tribunal's decision de novo. We also review de novo the grant or denial of a motion for summary disposition.

This Court has also held that "statutes exempting persons or property from taxation must be narrowly construed in favor of the taxing authority." *Liberty Hill Housing Corp v Livonia*, 480 Mich 44, 49 (2008). "[T]he burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond a reasonable doubt." *Ladies Literary Club v Grand Rapids*, 409 Mich 748, 754 (1980) (quoting 2 Cooley on Taxation (4th ed), §672, pp 1403-1404).



## ARGUMENT

**I. THE COURT OF APPEALS DID NOT ERR IN CONCLUDING THAT THE MICHIGAN TAX TRIBUNAL DID NOT MISAPPLY THE LAW OR ADOPT A WRONG PRINCIPLE WHEN IT HELD THAT HARMONY'S PROGRAMS DO NOT QUALIFY FOR EXEMPTION UNDER MCL 211.7N AND CORRECTLY CONCLUDED THAT HARMONY'S PROGRAMS DO NOT CONTRIBUTE SUBSTANTIALLY TO THE RELIEF OF THE EDUCATIONAL BURDEN OF GOVERNMENT.**

With respect to Harmony's claim for the educational exemption, the Court of Appeals remanded the case to the Tax Tribunal to determine whether Harmony contributed substantially to the relief of the government's educational burden:

However, there is a substantial question of fact about whether “a substantial portion of the student body” could and would attend a state-funded elementary school or preschool.<sup>3</sup> [*David Walcott Kendall Mem Sch v Grand Rapids*, 11 Mich App 231, 240; 160 NW2d 778 (1968)] . . . .

<sup>3</sup>Petitioner argues that the courts should not establish numerical thresholds in order to define what constitutes substantial contribution. We agree that there is no “bright line” threshold, either for a specific number or a specific percentage. However, determining the percentage of students who would and could attend a state-funded school does aid a court in determining if petitioner meets the “substantial portion of the student body” test. *David Walcott Kendall Mem Sch*, 111 Mich App at 240.

Exhibit E, at \*2

On remand, the Tax Tribunal was specifically directed to make this determination by considering “the children who were enrolled in petitioner's preschool program that would and could have attended the Great Start Readiness Program, and that would and could have attended a state-funded kindergarten program, even though they were enrolled in a Montessori preschool program.” Exhibit E, at \*2.

**A. A substantial portion of Harmony's students could not attend a State-funded kindergarten program.**

The Tribunal concluded, based upon the evidence of the number of five-year-olds attending Harmony during the relevant tax year, children who attend Harmony *could* attend a state-funded kindergarten program if Harmony were not in existence. However, Respondent notes that, while there were *some* five-year-olds who attended Harmony's kindergarten program (and therefore, could have attended a State-funded program), the number of such students was not *substantial*. Over the course of the four years at issue, only 7% (12 out of 175) of the total number of Harmony students were both five-years-old and participating in kindergarten. There were five-year-old students who were not participating in kindergarten, due most likely to their parents' decision to have them attend an additional year of preschool. Exhibit F, Tr at 55-56, 61-62. There were also a greater number of Harmony students who participated in kindergarten, but these students could not have attended a State-funded kindergarten because they were less than five-years-old. It is Respondent's position that, based upon the evidence submitted to the Tribunal, Harmony did not sustain its burden of establishing that a *substantial* number of its students *could* attend a State-funded kindergarten program.

With respect to its kindergarten program, Harmony argued that, by merely offering kindergarten classes with similar curriculum to that of public schools, it met the *David Walcott* standard. However, merely offering kindergarten classes does not establish that a substantial portion of children taking Harmony kindergarten classes would otherwise be enrolled in a state-supported kindergarten. The stipulated factual

record established that, for two of the years at issue, Harmony had only 2 kindergartners. For the other two years, Harmony had 4 kindergartners. Out of the grand total of 175 children over the four tax years in question, a mere 12 were kindergartners. At 7%, this is simply not a “substantial” portion of the total attendees.<sup>1</sup>

This case is similar to *Michigan Laborers' Training & Apprenticeship Fund v Twp of Breiting*, unpublished per curiam opinion of the Court of Appeals (Docket No. 303723, October 23, 2012) (attached as Exhibit G). In that case, the petitioner offered an apprenticeship program involving classroom study and hands-on training to help its enrollees become journeymen, with some of the credits earned being transferrable to Baker College. The Tax Tribunal found that the petitioner was not an educational institution and the Court of Appeals affirmed, concluding that the petitioner did not substantially relieve the burden of government:

In this case, the Tax Tribunal concluded that a substantial portion of the student body currently enrolled in petitioner's program would be unable to attend a state supported college or university to continue their education in the same major field of study. The Tax Tribunal noted that while some of petitioner's courses may be transferred for credit at Baker College, petitioner failed to provide any evidence that its major fields of study are offered by state supported colleges or universities. The record in this case indicates that there is no state supported program whereby participants can become apprentices or journeymen. The Tax Tribunal also noted that the evidence demonstrated that only 36 of the approximate 7,000 people trained by petitioner transferred their credits to Baker College. Thus, the Tax Tribunal found that “[e]ven if Baker College were a state-supported

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<sup>1</sup>The very nature of the terms “substantial portion” require some degree of numerical comparison. Merriam-Webster defines “substantial” as “3b: considerable in quantity; significantly great . . . 5: being largely but not wholly that which is specified . . . .” Merriam-Webster <<https://www.merriam-webster.com/dictionary/substantial>.> While Harmony argues that there should be no numerical threshold, it defies logic to argue that one can determine if a portion is substantial without some type of quantitative analysis. A point acknowledged even by the Court of Appeals. Exhibit E, page 3, note 3.

college, 36 students over a period of years would hardly decrease the state's burden.” The Tax Tribunal further noted that the Legislature has not mandated vocational training, and petitioner failed to point to any constitutional or statutory provision requiring the state to support vocational training. In *Mich Conservation Clubs v. Lansing Twp*, 423 Mich. 661, 669; 378 NW2d 737 (1985), the Court held that conservation education did not fit into the general scheme of education provided by the state because the state did not mandate conservation education. [at \*8-\*10]

In a similar manner, only a very small portion of the children who attend Harmony actually participate in the kindergarten program offered there. Further, this case shows that analysis of the actual numbers of students by which the institution is or is not relieving the burden of government is not, as Harmony contends, arbitrary.

Harmony’s reliance on *Petoskey v Bear Creek Township*, 1996 WL 20565 (1986) is misplaced because the facts at issue there were qualitatively and quantitatively distinguishable. In *Petoskey*, state-supported programs (elementary, kindergarten *and preschool*) were an available alternative to a high percentage - if not all - of the petitioner’s students because at least one of the relevant public school districts provided preschool free of charge to residents and on a tuition-basis to non-residents. *Petoskey*, at \*2. In contrast, Harmony established that only a very small percentage of its students could have attended a publicly funded kindergarten – and far less could have possibly attended a publicly funded preschool program. Harmony’s contention for the first time to this Court that other publicly funded preschool programs might be available to a larger number of its students does not provide a basis for reversing the Tribunal’s decision when no such evidence was presented to the Tribunal, despite Harmony having been afforded the opportunity to do so on remand.

The instant case is distinguishable from *David Walcott* where the court found that the art school *did* afford substantial relief to the burden of government. In that case, the only alternative colleges in Michigan with membership in the American Institute of Design and the National Society of Interior Design were, at the time, the University of Michigan and Michigan State University - both state supported schools. *Id* at 234. The total student body at the petitioner's institution was 325 students. The Court inferred the likelihood of that student body attending a state-supported institution if the art school were not in existence: "If such an institution is educating students qualified and willing to attend a State college or university, majoring in the same field of study, then it can be said that this institution is assuming a portion of the burden. . . ." *Id* at 240. The Court went on to conclude that education by the art school of the 325 students was a substantial relief of the burden of education: "Were it not for the existence of the plaintiff institution, it is clear that the burden imposed on the art and design departments of our State supported colleges and universities would be appreciably increased." *Id* at 243.

In contrast to this case, the institution in *David Walcott* was educating a significant number of students and most, if not all, of them would have attended state-supported universities were it not for the school's existence. Harmony cares for only about 40 students per year and, based upon the stipulated record, there is no evidence that anything other than a very small portion of those students would attend state-supported institutions were it not for Harmony. Accordingly, Harmony failed to sustain its burden of establishing that a substantial portion of its students *could* attend a State-funded kindergarten program and the Tribunal and the Court of Appeals agreed.

**B. A substantial portion of Harmony's students would not attend a State-funded kindergarten program.**

Regardless, even assuming that 7% was a *substantial portion* of Harmony's students who *could* attend a State-funded kindergarten program, the Tribunal and the Court of Appeals correctly concluded that a substantial portion of the student body at Harmony *would not* attend a state-funded school. Harmony did not offer any testimony or other evidence from either former or current Harmony parents that they would have sent their children to a public school were it not for the existence of Harmony. It is on this basis that Harmony's reliance upon *Petoskey v Bear Creek Township* is further misplaced. In *Petoskey*, the Tribunal's finding that a "high percentage" of children would attend state-supported schools was based upon testimony submitted to the Tribunal evidencing such:

The fact that the parents of the Montessori School children are willing to pay the tuition costs and the fact that these parents are actively involved in the educational process itself (per testimony) indicate to us that they are concerned with their children's education.

*Petoskey* at \*3. In this case, Harmony did not offer such testimony or other evidence, despite having been afforded the opportunity to do so on remand. Not only did Harmony not offer testimony or other evidence that a "high percentage" of parents would have sent their children to state-supported schools, it did not offer testimony or other evidence that *any* parents would do so. It cannot be said that the Tribunal's decision, in the absence of comparable evidence, was factually or legally erroneous.

In the absence of such evidence, the *David Walcott Kendall* Court offered the following guidance for determining whether a substantial number of students *would* attend a State-funded school if the petitioner were not in existence:

The probability of their attendance elsewhere on the college or university level would have to be derived, *inter alia*, from the requirements for admission to the school seeking exemption, the qualifications of the student, the major field of study undertaken by the student, the time necessary to complete the prescribed course of study, and the comparative quality and quantity of the courses offered by the school to the same programs at the State colleges and universities. If such an institution is educating students qualified and willing to attend a State college or university, majoring in the same field of study, then it can be said that this institution is assuming a portion of the burden of educating the student which otherwise falls on tax-supported schools.

*Id* at 782. The Tribunal's analysis of these factors was proper.

Contrary to Harmony's position on appeal, and as recognized by the Court of Appeals, the Tribunal did not erroneously focus on the “special delivery of education” rather than the underlying skills. Rather, in line with *David Walcott Kendall*, the Tribunal properly focused on “the comparative quality and quantity” of the education offered by Harmony as compared to the education provided by a State-funded kindergarten. The JSOF and Ms. King's testimony at the evidentiary hearing on remand provided ample evidence that the quality and quantity of education provided by Harmony differs significantly from that offered in public kindergarten:

In JSOF no. 16, it states,

The Montessori early education teaching method consists of:

Multiage groupings that foster peer learning, uninterrupted blocks of work time, and guided choice of work activity. In addition, a full complement of specially designed Montessori learning materials are

meticulously arranged and available for use in an aesthetically pleasing environment.

The teacher, child, and environment create a learning triangle. The classroom is prepared by the teacher to encourage independence, freedom within limits, and a sense of order. The child, through individual choice, makes use of what the environment offers to develop himself, interacting with the teacher when support and/or guidance is needed.

Multiage groupings are a hallmark of the Montessori Method: younger children learn from older children; older children reinforce their learning by teaching concepts they have already mastered. This arrangement also mirrors the real world, where individuals work and socialize with people of all ages and dispositions.

In early childhood, Montessori students learn through sensory-motor activities, working with materials that develop their cognitive powers through direct experience: seeing, hearing, tasting, smelling, touching, and movement.

Ms. King further testified that children learn,

life skills, such as pouring, spooning, dressing themselves, care of the environment, such as sweeping and mopping and dusting . . . . We do handwriting and reading . . . . Our fourth area is math. We start with basic one to five activities, for example, and go on through the decimal system, addition and subtraction, depending upon what level the child is at . . . . We do geography, history, sciences. I am not sure what else. There is a lot.<sup>8</sup>

<sup>8</sup>Tr at 47.

Exhibit A, pages 4-5 of 10. The Tribunal also relied upon Ms. King's testimony as establishing that Montessori programs teach children based on their skill set, rather than their age or grade, as is the case in public schools. Exhibit A, page 5 of 10. Ms. King also testified that, compared to public schools, children who attend a Montessori school



receive a lot more personal attention (because of the greater number of teachers in the room) and that the education is “quite high.” Exhibit F, Tr at 60.

The Tribunal's evaluation of the “comparative quality and quantity” of the education offered by Harmony, and its conclusion that, if not for Harmony, most parents would choose to send their child to a comparable Montessori school rather than a public school, was properly supported by competent, material, and substantial evidence on the whole record. The Tribunal then went further to determine whether there might be other Montessori programs - programs of comparable quality and quantity to Harmony - which were State-funded and for which Harmony might be relieving a substantial burden. The Tribunal's conclusion that there was no record evidence to support a finding of State-supported Montessori programs was not erroneous. Harmony argued that Ms. King's lack of knowledge as to whether there were State-supported Montessori programs did not establish that none exist. However, Harmony fails to appreciate that it had the burden to establish its entitlement to the exemption and, if such a school or schools existed for which Harmony was relieving a burden, Harmony bore the burden of offering evidence of that. *ProMed Healthcare v City of Kalamazoo*, 249 Mich App 490, 494–495; 644 NW2d 47 (2002) (a petitioner seeking a tax exemption bears the burden of proving, by a preponderance of the evidence, that it is entitled to the exemption). Harmony did not do so in this case.

The Court of Appeals also rejected Harmony's argument based upon Ms. King's testimony that an estimated 75% of Harmony students go on to public schools after completion of Harmony's Montessori program. This statistic is unremarkable and fails to

suggest that the Tribunal's conclusion with respect to participation in public preschools and kindergarten programs was not supported by competent, material and substantial evidence. The fact that a substantial percentage of children would go on to public elementary schools *after* Harmony is unremarkable as all of Harmony's students necessarily must go somewhere else for elementary education as Harmony does not offer any program beyond kindergarten.<sup>1</sup> Further, this statistic does not, standing alone, in light of the other record evidence relied upon by the Tribunal, suggest that a substantial percentage of children would attend a public kindergarten if Harmony were not in existence.

On appeal to the Court of Appeals, Harmony challenged not only the Tribunal's application of the *David Walcott Kendall* “would/could” test, but also the applicability of the test itself. Harmony argued on appeal that it sustained its burden of proving its entitlement to the educational exemption because, “. . . pre-primary educational programs such as Harmony's relieve the State's burden of educating children from age six to sixteen by properly preparing those children to start and succeed in their elementary school education.” As the Court of Appeals properly concluded, Harmony's argument was without merit. Harmony's contention that it (or any Montessori program) relieves the State's burden of educating children from ages 6 to 16 was not supported by competent or substantial evidence. Ms. King testified that it was her *opinion* that children who receive an early education are more likely to succeed in elementary school, are less likely to need remedial or special education, are less likely to need speech therapy, and are less likely to

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<sup>1</sup> This fact also distinguishes this case from *Petoskey* where the school provided elementary programs and nearly 25% of the students in one of the disputed years participated in that elementary program.

repeat a grade. Exhibit E, Tr at 52-53. However, Harmony offered no documentary evidence or expert testimony which suggested that Ms. King's opinion was based in fact, supported by studies, or corroborated in educational literature. Ms. King's personal opinion was factually insufficient to establish the premise raised by Harmony.

**C. A substantial portion of Harmony's preschool-aged students could not and would not attend a State-funded preschool program.**

With respect to the issue of preschool, the first panel of the Court of Appeals had concluded that “[The Tribunal] failed to consider the children who were enrolled in petitioner's preschool program that would and could have attended the Great Start Readiness Program [GSRP], . . . .”<sup>2</sup> With respect to the question of whether a substantial number of Harmony's preschoolers would and could attend a state-supported school if Harmony were not in existence, the Tribunal's decision was again supported by competent, material and substantial evidence and should be upheld. The record evidence established most of Harmony's students would not have family incomes which would qualify for admission into the GSRP. Exhibit F, Tr at 65-66. The Tribunal gave Harmony the benefit of the doubt and assumed, based upon the number of need-based

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<sup>2</sup>GSRP offers limited programs to a limited section of the population. Section 1632d provides that GSRP is available to disadvantaged children who are more than four, but less than five, years old. GSRP programs include home visits, group meetings, health screening, and community network resources. GSRP looks for certain eligibility factors for the children it enrolls: extremely low family income, low family income, diagnosed disability or developmental delay, severe or challenging behavior, English as a second language, parent or guardian with low educational achievement, abuse or neglect of parent or child, and other environmental risks (parental death, divorce, incarceration, etc.) See Risk Factors / Eligibility, issued by the Office of Great Start. [[http://www.michigan.gov/documents/mde/Risk\\_Factors\\_230731\\_7.pdf](http://www.michigan.gov/documents/mde/Risk_Factors_230731_7.pdf)]

scholarships given by Harmony, that two children *could* have qualified for the GSRP. However, as recognized by the Tribunal and the Court of Appeals, Harmony has never allowed any student to attend tuition-free and, by logic, even those two hypothetically-GSRP-qualified students still chose to pay some amount of tuition to attend Harmony rather than participate in the GSRP. Exhibit A, pages 6-7 of 10.

Harmony argued to the Court of Appeals that the Tribunal erroneously focused on whether parents of Harmony's preschoolers would choose another Montessori over public school were Harmony not in existence. According to Harmony, the Tribunal did not consider the “fact” that parents who are not low income (and therefore do not qualify for the GSRP) have no other choice but to pay for their children to attend early childhood programs. Harmony argued that, because of Harmony's existence, the State has not had to fund preschool for families which do not qualify for the GSRP. Harmony's arguments were without merit and the Court of Appeals properly concluded that they did not provide a basis for reversal of the Tribunal's decision.

There is no dispute that Harmony is not a GSRP. Exhibit F, Tr at 53-54. Harmony does not contend - nor did it offer any evidence to suggest - that there are any State-funded preschools other than GSRP. Hence, the GSRP is and was the only state-funded program for the Tribunal to evaluate under the *David Walcott Kendall* could/would test. Harmony simply could not establish that it substantially relieved the State of its burden of funding preschool programs under this test, even giving Harmony the benefit of all doubt. The fact that non-GSRP-qualifying families have to, and do, pay to send their children to preschool (or choose not to send them) does not establish that

Harmony relieves the State of any financial burden by accepting tuition for preschool programs. There was no evidence presented to the Tribunal by Harmony to suggest that the State has foregone funding additional preschool programs or declined to expand the qualifications for the GSRP because of Harmony's program.

On appeal to this Court, Harmony argues that the Tribunal's and Court of Appeals' decisions are erroneous because of the supposed existence of "several other programs directly related to early childhood education." Application, pages 17-18. Harmony fails to explain why, at any point in the proceedings below, it did not present to the Tribunal or the Court of Appeals any factual evidence of the applicability of these programs to its students or offer any analysis of how these programs would have led to a different conclusion as to Harmony's qualification as an educational institution. Harmony's argument is without merit. "When a cause of action is presented for appellate review, a party is bound to the theory on which the cause was prosecuted or defended in the court below." *Gross v General Motors Corp*, 448 Mich 147, 161-162, n 8; 528 NW2d 707 (1995).

Based on the above, Harmony failed to sustain its burden of establishing that it qualifies for the education exemption under MCL 211.7n and the Court of Appeals properly upheld the Tribunal's decision which was based upon competent, material and substantial record evidence and proper principles of law.

**II. THE COURT OF APPEALS MAJORITY PROPERLY AFFIRMED THE MICHIGAN TAX TRIBUNAL’S DECISION THAT HARMONY’S PROGRAMS DO NOT QUALIFY FOR EXEMPTION UNDER MCL 211.7o AND CORRECTLY CONCLUDED THAT HARMONY WAS NOT ORGANIZED CHIEFLY, OR SOLELY, FOR CHARITY, AND WAS NOT A CHARITABLE INSTITUTION OVERALL.**

MCL 211.7o(1) provides: “Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which that nonprofit institution was incorporated is exempt from the collection of taxes under this act.” This Court has set forth a three-part test for analyzing whether a particular entity is entitled to an exemption under this section:

- (1) The real estate must be owned and occupied by the exemption claimant;
- (2) The exemption claimant must be a nonprofit charitable institution; and
- (3) The exemption exists only when the buildings and other property thereon are occupied by the claimant solely for the purposes for which it was incorporated. [*Wexford Medical Group v City of Cadillac*, 474 Mich 192, 203 (2006)]

The only element at issue in this case was whether Harmony met the definition of a “nonprofit charitable institution.” In *Wexford*, this Court conducted a thorough review of cases attempting to define “charitable institution” and distilled several guidelines:

Several common threads can be found in this line of cases. First, it is clear that the institution's activities as a whole must be examined; it is improper to focus on one particular facet or activity. In that sense, the inquiry pertains more to whether an institution could be considered a “charitable” one, rather than whether the institution offers charity or performs charitable work. So it is the overall nature of the institution, as opposed to its specific activities, that should be evaluated.

A second indispensable principle is that the organization must offer its charitable deeds to benefit people who need the type of charity being offered. In a general sense, there can be no restrictions on those who are afforded the benefit of the institution's charitable deeds. This does not mean, however, that a charity has to serve every single person regardless of the type of charity offered or the type of charity sought. Rather, a charitable

institution can exist to serve a particular group or type of person, but the charitable institution cannot discriminate within that group. The charitable institution's reach and preclusions must be gauged in terms of the type and scope of charity it offers.

From these precepts, it naturally follows that each case is unique and deserving of separate examination. Consequently, there can be no threshold imposed under the statute. The Legislature provided no measuring device with which to gauge an institution's charitable composition, and we cannot presuppose the existence of one. To say that an institution must devote a certain percentage of its time or resources to charity before it merits a tax exemption places an artificial parameter on the charitable institution statute that is unsanctioned by the Legislature. [*Id* at 212-213]

The *Wexford* Court established the following definition of “charitable institution”:

“[Charity] \* \* \* [is] a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.” [474 Mich at 214 (quoting *Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc v Sylvan Twp*, 416 Mich 340, 348-349 (1982))]

This Court then supplied six factors to use in determining whether a particular institution is a charitable institution:

- (1) A “charitable institution” must be a nonprofit institution.
- (2) A “charitable institution” is one that is organized chiefly, if not solely, for charity.
- (3) A “charitable institution” does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a “charitable institution” serves any person who needs the particular type of charity being offered.
- (4) A “charitable institution” brings people's minds or hearts under the influence of education or religion; relieves people's bodies from disease, suffering, or constraint; assists people to establish themselves for life;

erects or maintains public buildings or works; or otherwise lessens the burdens of government.

(5) A “charitable institution” can charge for its services as long as the charges are not more than what is needed for its successful maintenance.

(6) A “charitable institution” need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a “charitable institution” regardless of how much money it devotes to charitable activities in a particular year. [*Id* at 215.]

The Tribunal in this case provided a well-reasoned analysis, based upon the stipulated facts and the evidence submitted at the evidentiary hearing, and properly concluded that Harmony did not sustain its burden of establishing that it was organized chiefly, if not solely, for charity. Unlike the petitioner in *Wexford*, Harmony did not offer its services to anyone who walked in the door but, instead, limited its services to those who are able to pay, with a very limited number of tuition discounts and waivers. The City established that, rather than offer charitable deeds to benefit people who need the type of charity being offered, Harmony is a business providing child care and educational services, albeit at a cost which does not enable Harmony to earn a profit.

The original Court of Appeals panel concluded that the Tribunal had misunderstood *Wexford*. The original panel concluded that, under *Wexford*, the determinative issue is whether or not Harmony’s operating deficit is to be made up by those receiving the services. Exhibit E, page 5. The Court concluded that the record “so far developed” did not answer this question and so remanded the matter back to the Tribunal for Harmony to establish these facts. Specifically, on remand, the Tribunal was to consider whether Harmony made up for operating losses by passing those losses onto



those receiving its services. The Tribunal's conclusion that Harmony did, at least in part, pass its operating deficit onto its students/families was supported by the record evidence and should be affirmed.

The record established that Harmony's tuition rates were competitive with other comparable centers and that tuition steadily increased over the years in question. While Harmony presented evidence of an ad-hoc, unwritten policy under which it discounted tuition for needy families, it did so only occasionally and based on the center's ability to afford to do so. Harmony made up for losses, at least in part, by charging its families increased tuition in subsequent years. Exhibit F, Tr at 36-37. Harmony never allowed a student to attend for free and only provided two need-based scholarships during the four years in question (and a total of eight need-based scholarships during its seventeen years in operation). Exhibit F, Tr at 34-35. Additionally, Harmony generated revenue from any number of fees charged to its families.<sup>3</sup> The fact that Harmony raised additional funds for extraordinary expenses by hosting fundraisers or accepting donations is unremarkable when considered alongside the evidence that Harmony placed the burden to finance its day-to-day operations on its tuition-paying families. As noted by the Court of Appeals majority, “. . .virtually every student at Harmony pays the full cost of the education they receive[,]” a fact which establishes that Harmony is not a charitable institution overall or organized chiefly, if not solely, for charity. Accordingly, the

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<sup>3</sup>Harmony argues that these fees were not meant to generate revenue, but only to serve as an economic motivator for families. However, there is no evidence in the record that Harmony ever gave the revenue generated by these fees back to its families or donated them. Whatever Harmony “meant” for these fees to be, they contributed to Harmony's income.

Tribunal's decision that Harmony was not entitled to the charitable exemption under MCL 211.7o was properly affirmed by the Court of Appeals.

### **CONCLUSION AND RELIEF REQUESTED**

Respondent-Appellee, the City of Oak Park, respectfully requests that this Honorable Court deny Petitioner's application for leave to appeal.

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Dated: January 10, 2017  
1312752

## EXHIBIT LIST

- Exhibit A     Final Opinion and Judgment on Remand
- Exhibit B     2016 Court of Appeals Opinion
- Exhibit C     Joint Stipulation of Facts
- Exhibit D     Michigan Tax Tribunal Opinion and Judgment
- Exhibit E     2014 Court of Appeals Opinion
- Exhibit F     Transcript of January 28, 2015 Evidentiary Hearing
- Exhibit G     *Michigan Laborers' Training & Apprenticeship Fund v Twp of Breiting*, unpublished per curiam opinion of the Court of Appeals (Docket No. 303723, October 23, 2012)

STATE OF MICHIGAN  
IN THE SUPREME COURT

HARMONY MONTESSORI CENTER,

Supreme Court No. 154819

Petitioner-Appellant,

Court of Appeals No. 326870

v

CITY OF OAK PARK,

Michigan Tax Tribunal  
Case No. 0370214

Respondent-Appellee.

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**PROOF OF SERVICE**

**Proof of Service:** I certify that a copy of the foregoing **RESPONSE TO PETITIONER-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF RESPONDENT-APPELLEE, CITY OF OAK PARK**, with attachments, and this **PROOF OF SERVICE** were served as indicated below.

Date of Service: January 10, 2017

Signature: /s/ Susan M. Westphal

**VIA U.S. MAIL**

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